

No. 48839-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN CARL BAKER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Supplemental Brief

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Constitutional Provisions

Washington Constitution, Article I, § 102

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I. ISSUE

- A. Did the off the record discussions violate Baker's constitutional right to a public trial, requiring automatic reversal of his convictions?

II. STATEMENT OF THE CASE

The State relies on the Statement of the Case it submitted in its original response brief for the underlying facts and procedures. This Supplemental Response Brief is in response to Baker's Supplemental Brief that was filed on July 13, 2017. The State did not object to Baker's submission of a supplemental brief. The sole issue in the supplemental briefing is whether Baker's right to a public trial was violated during three alleged courtroom closures.

The State will provide further substantive facts in its brief below as required.

III. ARGUMENT

- A. BAKER DOES NOT ESTABLISH, ON THIS RECORD, THAT THERE WAS A COURTROOM CLOSURE, THEREFORE HIS RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.**

Baker argues the trial court impermissibly closed the courtroom without conducting the requisite analysis thereby violating his right to a public trial. Baker argues there were three sidebars that constitute courtroom closures. Baker has not sufficiently proven the courtroom was closed. In the alternative, Baker has not provided a

sufficient record to review his claimed error. This Court should find there was not a violation of the public trial right and affirm Baker's convictions consistent with the arguments put forth in the State's Response Brief.

1. Standard Of Review.

Whether the trial court has violated a defendant's public trial right is a question of law and is reviewed de novo. *State v. Whitlock*, 188 Wn.2d 511, 520, 396 P.3d 310 (2017).

2. Baker Has Not Sufficiently Proven, With This Record, There Was A Courtroom Closure.

The United States Constitution and the Washington State Constitution guarantee that a criminal defendant has the right to a public trial. U.S. Const. amend. IV; Const. art. I, § 22. The Washington State Constitution also requires that "[j]ustice in all cases shall be administered openly and without undue delay." Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a closed proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005).

The public trial requirement is primarily for the benefit of the accused. *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). "[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) (citations omitted). The right to a public trial is closely linked to the defendant's right to be present

during critical phases of the trial. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

A three-part inquiry is employed to determine if a defendant's public trial rights have been violated. *Whitlock*, 188 Wn.2d at 520. The reviewing court determine: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified?" *Id.*, citing *State v. Smith*, 181 Wn.2d 508, 521, 334 P.3d 1113 (2012) (internal citation omitted).

When determining if the proceeding at issue implicates the public trial right, the courts apply the "experience and logic test." *Smith*, 181 Wn.2d at 511. This test was adopted by the Supreme Court in *State v. Sublett*, 176 Wn.2d 58. The experience and logic rule was formulated by the United States Supreme Court "to determine whether the core values of the public trial rights are implicated." *Sublett*, 176 Wn.2d at 73.

The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks 'whether public access plays a significant role in the functioning of the particular process in question. If the answer to both is yes, the public trial attaches and the *Waller*¹ or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

¹ *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Id. at 73 (internal quotations omitted), *citing Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986). The reviewing court is also required to “consider whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 75 (citations and internal quotations omitted).

When considering if sidebars implicate the public trial right, the Supreme Court in *Smith* employed the three-part test, starting with the inquiry into whether sidebars have been traditionally open to the general public. *Smith*, 181 Wn.2d at 519. Sidebars have not traditionally been open to the public. *Id.* The Supreme Court held, “allowing the public to ‘intrude on the huddle’ would add nothing positive to sidebars in our courts, we hold that a sidebar conference, even if held outside the courtroom does not implicate Washington’s public trial right.” *Id.*

We ruled that “[p]roper sidebars” do not meet either prong of the experience and logic test and therefore do not implicate the public trial right at all. *Id.* at 516-19 & n.10. We defined “[p]roper sidebars” as proceedings that “deal with the mundane issues implicating little public interest[,] ... done only to avoid disrupting the flow of trial, and ... either ... on the record or ... promptly memorialized in the record.” *Id.* at 516 & n.10 (citing *Wise*, 176 Wn.2d at 5). We also held that the particular proceedings at issue in that case—all addressing legal challenges and evidentiary rulings that were so devoted to legal “complexities” as to be

“practically a foreign language”—were proper sidebars.
Id. at 518-19; see *id.* at 539-41 (Owens, J., dissenting).

Whitlock, 188 Wn.2d at 522.²

It is a defendant’s burden to show a courtroom closure occurred when asserting a violation of his or her public trial rights.

State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). The Supreme Court explained:

“‘[O]n a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.’”

Njonge, 181 W.2d at 546, *citing State v. Jasper*, 174 Wn.2d 96, 123–24, 271 P.3d 876 (2012) (alteration in original) (quoting *Barker v. Weeks*, 182 Wash. 384, 391, 47 P.2d 1 (1935) (quoting 4 C.J. *Appeal and Error* § 2666, at 736 (1916))).

In Baker’s case he alleges three instances of courtroom closures from alleged sidebar conferences. See Supp. Appellant’s Brief. The first and second instance happen within a page of verbatim report of proceedings. RP 117-18. The first instance occurs when the parties are discussing Identification 6, a map that purports to show

² *Whitlock* is citing *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 as *Id.* *Whitlock* also cites to *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012).

an area of Pe Ell, which may not accurate. RP 114-17. Baker argues to this Court there is an improper sidebar conference due to the notation in the verbatim report of proceedings which states “(Discussion off the record)”. RP 117. The jury was already escorted from the courtroom prior to discussions about Identification 6. RP 115; 2nd Supp. CP Jury Trial. The entire exchange regarding the Identification went as follows:

MR. CLARK: So it has a red mark right there on it that says Security State Bank.

THE COURT: Okay.

MR. CLARK: However, when you look at the Earth's version of it, which hasn't been offered yet, we dispute that that's where it is three blocks up. My client specifically says at this specific location. I don't have a problem with it being entered otherwise, but I'd ask that that be redacted without some sort of foundation it's actually there.

THE COURT: Does it matter that the bank is there?

MR. CLARK: I think it does, because the jury is going to be able to see this, and if it's admitted, take it back with them. And if they see that it says Security State Bank and that's not the actual location, I would like to get an address just to verify.

THE COURT: So you are telling me the Google map shows a different location for the bank?

MR. CLARK: So I don't have the bank listed on the –

MS. WEIRTH: The witness says it's wrong too. I think it's wrong.

MR. CLARK: Okay.

THE WITNESS: I think it's showing the bank on the wrong side of the road.

(Discussion off the record.)

THE COURT: It's been a while since I've been to Pe Ell, but isn't there a convenience store at the intersection of SR 6 and this Pe Ell Avenue, the one that goes eventually to Pe Ell-McDonald Road? Isn't there a gas station convenience store there? Where is the post office? Where is the post office vis-a-vis that?

THE WITNESS: The mini mart would be back to where it says this Security State Bank except for on the other side of the street.

THE COURT: Yeah. So it's on the other side of the street.

THE WITNESS: There is a mini mart right there. There's the post office and the bank is over here.

THE COURT: Does the location of the bank have some significance with respect to this case?

MR. CLARK: Yes.

THE COURT: Who made the map?

MS. WEIRTH: Google.

THE COURT: Google made the map so it's not accurate.

MR. CLARK: According to both Ms. Harmon and Mr. Baker.

MS. WEIRTH: I will withdraw the exhibit and come back with another one tomorrow.

MR. CLARK: Thank you.

RP 116-18.

The second instance was immediately following this exchange. After Mr. Clark said, "Thank you." the following occurred:

(Discussion off the record.)

THE COURT: All right. So the bailiff has been informed -- this is on the record -- that Juror No. 1 apparently disclosed to the bailiff that she had overheard a conversation downstairs in the lobby, I assume on the first floor, apparently by the security guards.

THE BAILIFF: Yes. She was getting fingerprinted she said.

THE COURT: And apparently there was some discussion there that she overheard to the effect that the defendant was going to plead yesterday and didn't.

MR. CLARK: I think we have to have a mistrial, your Honor, and that's what I'm going to move for. I don't think you can have more prejudicial --

THE COURT: No, I'm not going there. The first thing that I have to do is make an inquiry as to what the juror overheard. The next step is to find out if she's disclosed this to anybody other than the bailiff. And if, in fact, nobody heard it but her, then the remedy is to excuse her and go with one of the alternates.

RP 118-19. The trial court then called in Juror 1 and inquired as to what she heard down in the lobby. RP 119. Juror 1 confirmed she had had a conversation with the security guard, and ultimately, she was told the defendant had pleaded guilty, changed his plea, and

decided to go to trial. RP 119-20. Juror 1 also told the trial court she did not discuss what she had heard with any of the other jurors. RP 121. Juror 1 had only told the bailiff about the conversation she had with the security officer. RP 121. Juror 1 was excused and an alternate juror was seated in the panel. 1RP 121-24.

The final instance Baker asserts was a courtroom closure occurred during Deputy Heller's testimony. RP 489. Deputy Heller was explaining how he took a digital recording of a statement from Baker. *Id.* The following exchange took place:

Q. What did you do with the SIM card with the recording of the conversation between you and Mr. Baker?

A. Upon completion of my initial report for this incident, I removed the SIM card from –

(Discussion off the record.)

THE COURT: No, he's not going to have the mike. You are just going to have to listen to what he has to say.

THE WITNESS: Upon completion of my incident report, I removed the SIM card from the department-issued recorder, inserted it into my department-issued computer, and removed the file from the SIM card into the computer and then transferred it into the report itself.

RP 489-90. Deputy Heller went on to testify about the recording and Identification 23, the recording was admitted without objection. RP 490-91.

Baker has not shown a closure occurred during any of the three instances where he alleges his public trial rights were violated. Baker argues in the first incident there was a discussion off the record regarding whether Identification 6 was an accurate representation of the relevant roads. Appellant's Supp. Brief at 8. Baker argues the second incident "appears to have involved the possible issue of a juror overhearing prejudicial information outside the courtroom." *Id.* In the last instance, Baker must again make an assumption as to what occurred, stating what "appeared" to have happened, that it must have been a discussion about the handling of Deputy Heller's SIM card. *Id.* at 9. Baker argues these closures happened without a proper *Bone-Club* analysis, are presumed prejudicial, are structural error, and require reversal.

Baker ignores that his record does not establish closures occurred. On a partial or incomplete record, this Court will not presume the existence of facts for which the record is silent for the purpose of finding reversible error. *Njonge*, 181 Wn.2d at 556 (internal citations omitted). Baker's claims about what he alleges occurred during these "discussions off the record" rely upon information not contained within this record. When a claim relies upon information outside the record the proper vessel to bring such

a claim is a collateral attack, as a direct appeal is limited to the record. *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

“Discussion off the record” can mean countless things that are not part of the court’s adjudication of the case. For example, the deputy prosecutor could have been discussing a matter with her witness, the defense attorney could have been conferring with his client, one of the attorneys could have needed water or a pad of paper, the judge could have been being passed a note from a bailiff, the bailiff could have informed the court that the jurors could not hear a witness, and much more. These are not sidebars, nor would they ordinarily be put on the record. There was no oral or written order closing the courtroom during these incidents. RP 116-19, 489-90; 2nd Supp. CP Jury Trial.

Further, the context of the verbatim report of proceedings, prior to and following each “discussion off the record,” give a clear indication that no sidebar was occurring. See RP 115-20, 489-90. In the first incident the entire discussion regarding whether the map was accurate is on the record. RP 115-18. The defense attorney, the State’s witness, and judge all weigh in on the map. *Id.* The defense attorney even comments that according to his client the map is

incorrect. RP 117. This statement is made after the discussion off the record. *Id.* Nothing in this record indicates there was a discussion in a sidebar conference about Identification 6. Everyone's input is there on the record.

The second instance, immediately following "Discussion off the record", is the trial court informing the parties that the bailiff has been informed that Juror 1 had overheard an improper conversation. RP 118. Then there is a complete discussion about what the next steps will be and an inquiry of Juror 1 on the record. RP 118-24. At best it appears the discussion off the record is the bailiff informing the judge about Juror 1. This is not a courtroom closure, nor is it a sidebar.

In the final incident Deputy Heller testified about what he did with his SIM card and then there is a notation about a discussion off the record. RP 489. The trial court states, "No, he's not going to have the mike. You are just going to have to listen to what he has to say." RP 489-90. The next line is Deputy Heller continuing with his testimony about what he did with his SIM card.

It is unclear to whom the trial court was speaking when the judge spoke after the discussion off the record. In the context of the record, it appears whatever discussion occurred off the record had

to do with a microphone and not a SIM card given the trial court judge's interjection into the record and Deputy Heller's continuation of his testimony. See RP 489-90. Out of all of the incidents given, this rises to what parties might discuss at a sidebar when trying to deal with a witness the jury cannot hear. But again, the record is not sufficient to determine there was a courtroom closure or even a sidebar conference. It may have been the bailiff, a juror, or even the defendant, who called out they could not hear Deputy Heller, if that is in fact what occurred. The record is not clear.

Baker does not establish a closure occurred. The trial court did not order the courtroom closed, either by written or oral order. There is nothing in the record indicating something happened during the three "discussion off the record" incidents. Therefore, this Court cannot conclude the courtroom was closed. There was no violation of Baker's public trial right and Baker's convictions should be affirmed consistent with the State's arguments in its Response brief.

IV. CONCLUSION

Baker does not show, on the record before this Court, that the trial court closed the courtroom. There was not improper sidebar conference. Therefore, the trial court did not violate Baker's public trial right. This Court should affirm Baker's convictions consistent with the State's arguments in its Response Brief.

RESPECTFULLY submitted this 8th day of September, 2017.

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